A **KERUNTUM SDN BHD v. THE DIRECTOR OF FOREST & ORS**

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
B BALIA YUSOF WAHI FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
[CIVIL APPEAL NO: 01(f)-22-10-2014(Q)]
7 DECEMBER 2017

C ***CIVIL PROCEDURE:*** *Court – Federal Court – Coram failure – Federal Court dismissed applicant's case – Applicant incorporated in Sarawak and subject to Bornean territory – Whether Bornean dispute before Federal Court must be decided by panel which includes at least one judge with Bornean judicial experience – Whether phrase 'with Bornean judicial experience' means having judicial experience*
D *at time of sitting – Whether Federal Court Judge who sat and penned judgment dismissing applicant's case had Bornean judicial experience – Whether there was coram failure – Federal Constitution, arts. 122 & 128 – Report of the Inter Governmental Committee 1962, para. 26(4)*

CONSTITUTIONAL LAW: *Courts – Federal Court – Allegation of coram failure*
E *– Federal Court dismissed applicant's case – Applicant incorporated in Sarawak and subject to Bornean territory – Whether Bornean dispute before Federal Court must be decided by panel which includes at least one judge with Bornean judicial experience – Composition and constitution of Federal Court – Whether there was coram failure – Federal Constitution, arts. 122 & 128 – Report of the Inter-*
F *Governmental Committee 1962, para. 26(4)*

The applicant commenced an action at the High Court against the respondents to recover damages. The High Court dismissed the claim and the decision was affirmed by the Court of Appeal. The applicant appealed to the Federal Court and Hasan Lah FCJ delivered the judgment and dismissed the
G appeal. In the present application, the applicant submitted that there was a coram failure when the applicant's appeal was heard before the Federal Court. According to the applicant, (i) being a company incorporated in Sarawak, the applicant was subject to Bornean territory; (ii) art. 128 of the Federal Constitution ('the FC'), read together with para. 26(4) of the report
H of the Inter-Governmental Committee 1962 ('the RIGC'), stipulated that a Bornean dispute before the Federal Court must be decided by a panel which includes at least one judge with Bornean judicial experience; (iii) the phrase 'with Bornean judicial experience' in para. 26(4) of the RIGC must mean having judicial experience at the time of the sitting; and (iv) Hasan Lah FCJ,
I who sat and penned the judgment of the Federal Court, was not with Bornean

judicial experience. In objection of the applicant's application, the respondent submitted that there was no coram failure as there was no allegation of the same made by the applicant at any time during the proceedings of the Federal Court.

Held (dismissing application)
Per Zulkefli Ahmad Makinudin PCA delivering the judgment of the court:

(1) To review the judgment given by the panel of the Federal Court which heard and decided on this case would cause injustice to the respondents as the applicant, through its own fault, had not raised an objection on this issue before the said panel of the Federal Court. Such an issue on the composition and competency of the members of the Bench of the Federal Court should have been taken up by the applicant at the outset of the hearing of the case and not after the case has come to a final conclusion. (para 14)

(2) Article 128 of the FC deals specifically with the jurisdiction of the Federal Court but not its constitution or composition. The Federal Court, when dealing with the applicant's appeal then, was exercising its appellate jurisdiction. Therefore, the applicant's reliance on art. 128 of the FC was totally misplaced. It is art. 122 of the FC which provides for the constitution of the Federal Court. However, art. 122 of the FC does not expressly provide that amongst the judges of the Federal Court, there must be one with Bornean judicial experience. A reference was made to s. 19 of the Malaysia Act 1963 and art. 123 of the FC on the qualification for appointment of a judge of the Federal Court. Neither of these two provisions stipulates that the qualification for appointment of a judge of the Federal Court having Bornean judicial experience is either required or preferred. (paras 15 & 16)

(3) The composition of the Federal Court is determined by the Chief Justice. Subsequent to the RIGC and the coming into force of the Courts of Judicature Act 1964 ('the CJA') throughout Malaysia, s. 74 remained unamended. Section 74 of the CJA, read together with art. 122 of the FC, clearly does not impose a legal requirement that the Federal Court, when hearing or disposing of cases, must consist of at least one judge with Bornean judicial experience. (para 17)

(4) The recommendation in para. 26(4) was never implemented by an express provision in the FC nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak. Article VIII of the Malaysia Agreement 1963 did not mandate the Judiciary to take action to implement the said recommendation and the recommendation in para. 26(4) of the RIGC could not be enforced by the courts whether by a decision made in this application or by way of rules made pursuant to ss. 16 and 17 of the

CJA. Therefore, the applicant could not claim any legal right to have a judge with Bornean experience in the appeal panel when its appeal was heard and decided by the Federal Court. (paras 19, 20 & 21)

(5) The expression 'Bornean judicial experience' was not defined nor explained in the RIGC. A judge 'with Bornean judicial experience' in the context of the RIGC is not a person 'of Borneo' by reason of his birth and residence in the Borneo States. The term 'Borneo judicial experience' puts emphasis on 'judicial experience' and not the origin of the judge. The term 'judicial experience' must, in its plain and ordinary meaning, mean that a judge who has the experience of having served as a judge in any of the Borneo States and, in his judicial capacity as a judge, has heard and disposed of cases arising from a Borneo State before any court whether subordinate court, High Court, Court of Appeal or the Federal Court when that particular court sits in the State. (paras 22 & 23)

(6) Hasan Lah FCJ, who wrote the judgment of the Federal Court in the present case, had previously served in the High Court in Sarawak and had heard and decided on cases filed in the High Court in Sarawak. As for the remaining four members of the panel of the Federal Court, they too had previously sat in the Court of Appeal and Federal Court to hear and dispose of cases originating from Sabah or Sarawak. (para 24)

Bahasa Malaysia *Headnotes*

Pemohon memulakan satu tindakan di Mahkamah Tinggi terhadap responden-responden bagi mendapatkan ganti rugi. Mahkamah Tinggi menolak tuntutan tersebut dan keputusan ini disahkan oleh Mahkamah Rayuan. Pemohon merayu di Mahkamah Persekutuan dan Hasan Lah HMP menyampaikan penghakiman dan menolak rayuan tersebut. Dalam permohonan ini, pemohon menghujahkan terdapat kegagalan kuorum semasa rayuan pemohon dibicarakan di Mahkamah Persekutuan. Menurut pemohon (i) sebagai syarikat yang ditubuhkan di Sarawak, pemohon tertakluk pada wilayah Borneo; (ii) per. 128 Perlembagaan Persekutuan ('PP'), dibaca bersekali dengan perenggan 26(4) Report of the Inter-Governmental Committee 1962 ('RIGC'), memperuntukkan bahawa pertikaian dari Borneo di Mahkamah Persekutuan mestilah diputuskan oleh panel yang termasuk sekurang-kurangnya seorang hakim dengan pengalaman kehakiman Borneo; (iii) frasa 'with Bornean judicial experience' dalam perenggan 26(4) RIGC semestinya bermaksud mempunyai pengalaman kehakiman ketika bersidang; dan (iv) Hasan Lah HMP, yang bersidang dan menulis penghakiman Mahkamah Persekutuan, tidak mempunyai pengalaman kehakiman Borneo. Membantah permohonan perayu, responden mendalihkan tiada kegagalan kuorum kerana perayu tidak membuat dakwaan tentang ini semasa prosiding Mahkamah Persekutuan.

Diputuskan (menolak permohonan)
Oleh Zulkefli Ahmad Makinudin PMR menyampaikan penghakiman mahkamah:

(1) Semakan atas penghakiman yang disampaikan oleh panel Mahkamah Persekutuan yang mendengar dan memutuskan kes ini akan menyebabkan ketidakadilan pada responden-responden kerana pemohon, atas salah sendiri, tidak membangkitkan bantahan terhadap isu ini di hadapan panel Mahkamah Persekutuan tersebut. Isu komposisi dan kekompetenan ahli-ahli sidang Mahkamah Persekutuan sepatutnya dibangkitkan oleh pemohon dari awal perbicaraan kes dan bukan selepas kes telah dimuktamadkan.

(2) Perkara 128 PP adalah khusus tentang bidang kuasa Mahkamah Persekutuan tetapi bukan pembentukan atau komposisinya. Mahkamah Persekutuan, ketika membicarakan rayuan pemohon, menjalankan bidang kuasa rayuannya. Oleh itu, sandaran perayu pada per. 128 PP sama sekali salah. Perkara 122 PP yang memperuntukkan pembentukan Mahkamah Persekutuan. Walau bagaimanapun, per. 122 PP tidak memperuntukkan dengan nyata bahawa antara Hakim-hakim Mahkamah Persekutuan, mesti terdapat seorang dengan pengalaman kehakiman Borneo. Rujukan dibuat pada s. 19 Akta Malaysia 1963 dan per. 123 PP tentang kelayakan pelantikan Hakim Mahkamah Persekutuan. Kedua-dua peruntukan ini tidak menyatakan bahawa pelantikan Hakim Mahkamah Persekutuan yang mempunyai pengalaman kehakiman Borneo diperlukan atau diberi keutamaan.

(3) Komposisi Mahkamah Persekutuan ditetapkan oleh Ketua Hakim Negara. Susulan RIGC dan penguatkuasaan Akta Mahkamah Kehakiman 1964 ('AMK') seluruh Malaysia, s. 74 kekal tidak terpinda. Seksyen 74 AMK, dibaca bersekali dengan per. 122 PP, jelas tidak mengenakan syarat perundangan bahawa Mahkamah Persekutuan, semasa mendengar atau melupuskan kes-kes, mesti terdiri daripada sekurang-kurangnya seorang hakim dengan pengalaman kehakiman Borneo.

(4) Cadangan dalam perenggan 26(4) tidak pernah dilaksanakan melalui peruntukan nyata PP mahupun mana-mana badan perundangan, eksekutif atau lain-lain tindakan oleh Kerajaan Persekutuan Malaya, Borneo Utara (Sabah) dan Sarawak. Artikel VIII Perjanjian Malaysia 1963 tidak memberi mandat kepada Badan Kehakiman untuk mengambil tindakan melaksanakan cadangan tersebut dan cadangan dalam perenggan 26(4) RIGC tidak boleh dikuatkuasakan oleh mahkamah-mahkamah baik melalui keputusan yang dibuat dalam permohonan ini atau melalui kaedah-kaedah yang dibuat bawah ss. 16

dan 17 AMK. Oleh itu, pemohon tidak boleh menuntut apa-apa hak bawah undang-undang agar hakim dengan pengalaman kehakiman Borneo bersidang semasa rayuannya didengar dan diputuskan oleh Mahkamah Persekutuan.

(5) Ungkapan 'Bornean judicial experience' tidak ditafsirkan atau dijelaskan dalam RIGC. Seorang hakim 'with Bornean judicial experience' dalam konteks RIGC bukan seorang dari Borneo berdasarkan kelahiran dan kediamannya di negeri-negeri Borneo. Terma 'Borneo judicial experience' menekankan 'judicial experience' dan bukan asal-usul hakim tersebut. Terma 'judicial experience' mesti, dalam maksud biasa dan lazimnya, bermaksud seorang hakim yang mempunyai pengalaman berkhidmat sebagai hakim di mana-mana negeri Borneo dan, dalam kapasiti kehakimannya sebagai hakim, telah mendengar dan melupuskan kes-kes dari negeri Borneo di mana-mana mahkamah; sama ada mahkamah bawahan, Mahkamah Tinggi, Mahkamah Rayuan atau Mahkamah Persekutuan semasa mahkamah tersebut bersidang di negeri itu.

(6) Hasan Lah HMP, yang menulis penghakiman Mahkamah Persekutuan dalam kes ini, terdahulu pernah berkhidmat di Mahkamah Tinggi Sarawak dan mendengar serta memutuskan kes-kes yang difailkan di Mahkamah Tinggi Sarawak. Empat lagi ahli panel Mahkamah Persekutuan juga pernah bersidang di Mahkamah Rayuan dan Mahkamah Persekutuan untuk mendengar dan melupuskan kes-kes dari Sabah atau Sarawak.

Case(s) referred to:

Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v. Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener) [2010] 2 CLJ 925 FC ***(refd)***

G Scammell and Nephew Ltd v. Hurley & Ors [1929] 1 KB 419 ***(refd)***

Gan Boon Aun v. PP [2016] 6 CLJ 647 FC ***(refd)***

Gurbachan Singh Bagawan Singh & Anor v. Vellasamy Pennusamy & Ors And Other Applications [2012] 2 CLJ 663 FC ***(refd)***

James v. Commonwealth of Australia [1936] AC 578 ***(refd)***

Mak Koon Yong & Anor v. Municipal Councillors, Malacca [1967] 1 LNS 98 HC ***(refd)***

Olga Tellis v. Bombay Municipal Corporation [1985] 3 SCC 545 ***(refd)***

PP v. Azmi Sharom [2015] 8 CLJ 921 FC ***(refd)***

Raja Petra Raja Kamarudin v. Menteri Dalam Negeri [2010] 4 CLJ 25 FC ***(refd)***

Ronald Beadle v. Hamzah HM Saman & Ors [2007] 1 CLJ 421 CA ***(refd)***

Three Rivers District Council v. Bank of England (No 3) [2000] 2 WLR 1220 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 16, 17, 74, 81, 82
Federal Constitution, arts. 5(1), 8(1), 122, 123, 128
Malaysia Act (Sabah) (Cap 35), s. 19
Rules of the Federal Court 1995, r. 137

For the applicant - Gopal Sri Ram, Colin Lau & David Yii; M/s Michael Ong & Chang Advocs
For the respondents - Foong Joo Chung & Lonie Pindda; AG's Chambers, Sarawak

Reported by Najib Tamby

JUDGMENT

Zulkefli Ahmad Makinudin PCA:

[1] The applicant herein filed a motion (pursuant to r. 137 of the Rules of the Federal Court 1995) *vide* encl. 30(a) to review the decision of a different panel of this court sitting on 15 March 2017 dismissing the applicant's appeal with costs. Learned counsel for the applicant advanced the following grounds in support of its application:

> That there was a coram failure as the Federal Court panel was not duly constituted. At the material time there was no member of the panel who is a judge of Borneo and therefore with Borneo experience. In light of the aforesaid, the Appellant's position is that there was a violation of Article 128 of the Federal Constitution, read together with para 26(4) of the Report of the Inter-Governmental Committee 1962.

[2] The background facts leading to this application are as follows: The applicant brought a suit against the respondents to recover damages for the revocation of two timber licences issued by the second respondent to the applicant. The applicant's claim against the respondents was both in contract and in the tort of misfeasance of public office.

[3] At the High Court, after a full trial, the learned trial judge dismissed the applicant's claim with costs. The applicant then appealed to the Court of Appeal. The appeal was heard and was dismissed on 4 March 2014. This court granted leave to the applicant on 14 August 2014 on the following questions of law, namely:

a) Whether, in a civil case, a trial judge is entitled to make a finding of balance of probabilities against a plaintiff in favour of a defendant who never gave evidence or who has declined to give evidence in his own defence.

b) Whether the elements of the tort of misfeasance in public office as laid down by House of Lords in *Three Rivers District Council v. Bank of England (No 3)* [2000] 2 WLR 1220 should be applied by the courts of Malaysia.

c) Whether the mental element of the tort of misfeasance as set out in *Three Rivers District Council v. Bank of England (No 3)* [2000] 2 WLR 1220 is sufficiently made out by the execution of a public act for a collateral purpose.

A d) Whether the act of revocation of a licence has continuing effect for the purpose of the law of limitation having regard to the decisions in *Mak Koon Yong & Anor v. Municipal Councilors, Malacca* [1967] 1 LNS 98; [1967] 1 MLJ 256 and *Ronald Beadle v. Hamzah HM Saman & Ors* [2007] 1 CLJ 421; [2007] 2 MLJ 201.

B e) Whether the defence of limitation under the Public Authorities Protection Act 1948 is available to an action in the tort of misfeasance in public office having regard to the decision of the House of Lords in *Three Rivers District Council v. Bank of England (No 3)* [2000] 2 WLR 1220 and that of the English Court of Appeal in *G Scammell and Nephew Ltd* C *v. Hurley & Ors* [1929] 1 KB 419.

[4] This court on 15 March 2017 delivered its judgment dismissing the applicant's appeal. His Lordship Hasan Lah FCJ, in delivering the judgment of the court answered the questions of law posed in the following manner:

D [80] We find it unnecessary to answer the first question of law posed in this appeal because on the facts of this case there was no duty on the defendants to give evidence in their defence.

[81] As regards the second question, it is clear from the submission of the parties that the principles of law enumerated in *Three Rivers District Council* have been accepted and applied by the Malaysian courts. See the case of E *Dato' Pahlawan Ramli bin Yusuff v. Tan Sri Abdul Gani bin Patail & Ors* [2015] 7 MLJ 763; [2014] 9 CLJ 489, *Riga Sdn Bhd v. Awang Sepian Haji Awang Joini & 3 Ors* [2005] MLJU 668; [2005] 1 LNS 251, *Ng Kim Moi (P) & Ors v. Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301.

F [82] Under the circumstances we find it unnecessary to answer the second question.

[83] As regards the third question posed in this appeal, we also find it unnecessary to answer it as it has not been proved that the revocation of the plaintiff's licence was done for a collateral purpose. To answer a G legal question not related to the facts of the case would be an academic exercise (see *Blue Valley Plantation Bhd v. Periasamy a/l Kuppannan & Ors* [2011] 5 MLJ 521; [2011] 5 CLJ 481).

[84] We will now deal with the fourth question of law. On the issue of limitation, the relevant provision is s. 2(a) of the PAPA and it, *inter alia*, H provides that any suit against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority shall not lie or be instituted unless it is commenced within 36 months next after the act, or in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof.

I

> [86] We agree with the finding of the learned trial judge on this issue and we do not find any merit in the plaintiff's argument on this issue. For the reasons given we answer the fourth question of law in the negative.
>
> [87] We find it unnecessary to answer the fifth question as the plaintiff failed to prove the tort of misfeasance in public office against the defendants.

Submissions Of The Applicant

[5] Learned counsel for the applicant submitted that there was a coram failure when the applicant's appeal was heard before this court. The applicant is a company incorporated in Sarawak. It is a subject of Bornean territory. It filed the present suit in the High Court at Kuching. It is contended for the applicant that, reading art. 128 of the Federal Constitution read together with para. 26(4) of the report of the Inter-Governmental Committee 1962 ("IGC report"), it is clear that a Bornean dispute before the Federal Court must be decided by a panel which includes at least one judge with Bornean judicial experience. Paragraph 26(4) of the IGC report reads as follows:

> (4) The domicile of the Supreme Court should be in Kuala Lumpur. Normally at least one of the Judges of the supreme Court should be a Judge with Bornean judicial experience when the Court is hearing a case arising in a Borneo State; and it should normally sit in a Borneo State to hear appeals in cases arising in that State.

[6] It is the applicant's case that the phrase "with Bornean judicial experience" must mean having Bornean judicial experience at the time of the sitting. His Lordship Justice Hasan Lah FCJ, who sat and wrote the judgment of this court on appeal was not with Bornean judicial experience. It was impressed upon us that it is permissible for the court to refer to a constitutional document such as the IGC report in interpreting the Constitution. (See *PP v. Azmi Sharom* [2015] 8 CLJ 921; [2015] 6 MLJ 751).

[7] Learned counsel for the applicant also submitted that the Constitution is not to be construed in any narrow and pedantic sense. (See *James v. Commonwealth of Australia* [1936] AC 578). It must be read as a whole to give effect, as far as possible, to all its provisions. (See *Dato' Seri Ir. Hj. Mohammad Nizar Jamaluddin v. Dato' Seri Dr. Zambry Abdul Kadir; Attorney General (Intervener)* [2010] 2 CLJ 925; [2010] 2 MLJ 285). It is imperative to observe that the Constitution confers additional protections for the Bornean States.

[8] Learned counsel for the applicant further submitted that the applicant has a fundamental right on a proper construction of art. 5(1) read with art. 8(1) of the Federal Constitution to have its case heard by this court comprising at least one member who has Bornean judicial experience. Such fundamental right is conferred by the IGC report. The IGC report is of constitutional importance and there would not be a Malaysia without it.

[9] It is the applicant's case there has been a violation not only of the basic structure of the Constitution but also art. 5(1) of the Constitution. The applicant was deprived of a constitutional right guaranteed under art. 5(1) of the Constitution to have a duly constituted panel under the Constitution. (See *Gan Boon Aun v. PP* [2016] 6 CLJ 647; [2016] 4 MLJ 265).

[10] Learned counsel for the applicant argued that it is important to note that para. 26(4) of the IGC report uses the phrase "normally". The present case is a normal case. Therefore, the convention ought to have been observed having regard to the Federal structure.

[11] Learned counsel also submitted the fact that no objection was taken or that the issue was not raised in earlier proceedings is irrelevant as there can be no estoppel or waiver against a constitutional violation. (See *Olga Tellis v. Bombay Municipal Corporation* [1985] 3 SCC 545).

Decision

[12] The sole ground for this application by the applicant was a coram failure of the Bench of the Federal Court that sat and decided the case on appeal from the decision of the Court of Appeal.

[13] As to when "coram failure" occurs had been explained by the Federal Court in the cases of *Gurbachan Singh Bagawan Singh & Anor v. Vellasamy Pennusamy & Ors. And Other Applications* [2012] 2 CLJ 663 and *Raja Petra Raja Kamarudin v. Menteri Dalam Negeri* [2010] 4 CLJ 25. It was held based on the decision of these two cases a coram failure occurs when the number of judges hearing a case before the Federal Court should at any time fall below the number specified under s. 74 of the Courts of Judicature Act 1964 ("CJA"). Section 74 of the CJA provides as follows:

> 74(1) Subject as hereinafter provided, every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine.
>
> (2) In the absence of the Chief Justice, the most senior member of the Court shall preside.

[14] Learned counsel for the respondent submitted, on this issue of coram failure, there was no allegation by the applicant that at any time during the proceedings before the court hearing the appeal then, that the panel had less than the number of judges specified by s. 74 of the CJA. As such, there was no coram failure. On this point, we agree with the submission of the respondent since there was no coram failure, the allegation of injustice and procedural unfairness were clearly unsustainable. We take the view that to review the judgment given by the panel of the Federal Court which heard and

decided on this case on its merits would in fact cause injustice to the respondents as the applicant through their own fault had not raised its objection on this issue before the said panel of the Federal Court. Such an issue on the composition and competency of the members of the Bench of the Federal Court should have been taken up by the applicant as the appellant as a matter of procedure at the outset of the hearing of the case and not after the case has come to a final conclusion.

[15] For the applicant, it was argued that there has been a violation of art. 128 of the Federal Constitution read together with para. 26(4) of the IGC report when there was no member of the panel that heard and decided the present case, of a judge with Borneo judicial experience. With respect, it is our considered view that art. 128 deals specifically with the jurisdiction of the Federal Court but not its constitution or composition. (See ss. 81 and 82 of the CJA). The Federal Court when dealing with the applicant's appeal then was exercising its appellate jurisdiction. Therefore the reliance on art. 128 of the Federal Constitution by the applicant is totally misplaced when the complaint is on an alleged "quorum failure" of the said Federal Court appeal panel.

[16] It is to be noted that it is art. 122 of the Federal Constitution which provides for the constitution of the Federal Court. This article does not expressly provide that amongst the judges of the Federal Court, there must be one with Bornean judicial experience. A reference was made to the provision of s. 19 of the Malaysia Act 1963 and art. 123 of the Federal Constitution on the qualification for appointment of a judge of the Federal Court. Neither of these two provisions stipulates that the qualification for appointment of a judge of the Federal Court having Bornean judicial experience is either required or preferred.

[17] The composition of the Federal Court at any given time is determined by the Chief Justice. It is also to be noted that subsequent to the IGC report, and the coming into force of the Courts of Judicature Act 1964 throughout Malaysia with effect from 16 March 1964, s. 74 remained unamended. It is our considered view reading s. 74 of the CJA together with art. 122 of the Federal Constitution, clearly does not impose a legal requirement that the Federal Court, when hearing or disposing of cases, must consist of at least one judge with Bornean judicial experience.

[18] On the applicability of para. 24 of the IGC report relied on by the applicant and the use of the word "normally" in the said report, we are of the view that it did not intend to impose any mandatory requirement regarding both the composition of the court or where it sits when hearing a case arising from a Borneo State. With respect, we do not agree with the contention of the applicant that because the present case is a normal case, therefore the convention ought to have been observed having regard to the Federal structure of our Federal Constitution.

[19] It is to be noted that the recommendation in para. 26(4) of the IGC report was never implemented under Article VIII of the Malaysia Agreement 1963 which provides as follows:

> The Governments of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to the Report of the Inter-Governmental Committee signed on 27 February, 1963, in so far as they are not implemented by express provisions of the constitution of Malaysia.

[20] The said recommendation in para. 26(4) was never implemented by an express provision in the Federal Constitution nor by any legislative, executive or other action by the Government of the Federation of Malaya, North Borneo (Sabah) and Sarawak. We are in agreement with the submission of learned counsel for the respondent that Article VIII of the Malaysia Agreement did not mandate the Judiciary to take action to implement the said recommendation and the recommendation in para. 26(4) of the IGC report cannot be enforced by the courts whether by a decision made in this application or by way of rules made pursuant to ss. 16 and 17 of the CJA.

[21] It is our judgment that since the said recommendation of the IGC report has not and was never implemented under Article VIII of the Malaysia Agreement, the applicant cannot therefore claim any legal right to have a "judge with Bornean experience" in the appeal panel when its appeal was heard and decided by the Federal Court.

[22] It is noted that the expression "Bornean judicial experience" was not defined nor explained in the IGC report. The applicant might have contended that this expression means "a judge of Borneo" or that "a judge of Borneo" is a person who is from the Borneo States by reason of having been born or resident there. On this point, we do not think that a judge "with Bornean judicial experience" in the context of the IGC report is a person "of Borneo" by reason of his birth and residence in the Borneo States. This is because the term "Borneo judicial experience" puts emphasis on "judicial experience" and not on the "origin" of the judge.

[23] We are of the view the term "judicial experience" must in its plain and ordinary meaning mean that a judge who has the experience of having served as a judge in any of the Borneo States and in his judicial capacity as a judge has heard and disposed of cases arising from a Borneo State before any court whether subordinate court, High Court, Court of Appeal or the Federal Court when that particular court sits in the State.

[24] It is worth noting that His Lordship Hasan Lah FCJ, who wrote the judgment of the Federal Court in the present case, had previously served in the High Court in Sarawak and had heard and decided on cases filed in the High Court in Sarawak. As for the remaining four members of the five members' panel of the Federal Court who sat in the present case, they too had previously sat in the Court of Appeal and Federal Court to hear and dispose of cases originating either from Sabah or Sarawak.

[25] For the reasons above-stated, we find there is no merit in the applicant's application. The application is dismissed with costs.